EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Peter Kyllo

("Kyllo")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: File No. 96/060

DATE OF DECISION: August 22nd, 1996

DECISION

OVERVIEW

Peter Kyllo ("Kyllo") has filed an application, pursuant to section 116 of the Employment Standards Act (the "Act"), for reconsideration of an adjudicator's decision to vary Determination No. CDET 000464 issued by the Director of Employment Standards on December 14th, 1995 (the "Determination"). The adjudicator, in a written decision issued May 13th, 1996, held, following a two-day hearing, that Marika and Mariano Mejias (the "employees") were employed by Kyllo Bros. Holdings, Kenneth Peter Kyllo and the present applicant for reconsideration, Peter Kyllo. The adjudicator held that all three employers were liable for unpaid wages in the amount of $3,281.60 for Marika Mejias and $1,968.83 for Mariano Mejias. The original Determination against the employer was for the sum of $8,988.14 of which $4,772.08 was allocated to Marika Mejias and $4,216.06 was allocated to Mariano Mejias.

The application for reconsideration submitted by Kyllo is set out in two separate letters dated June 15th, 1996 and July 25th, 1996, respectively. Numerous allegations are raised in the two letters. In general, these allegations may be characterized as complaints about the investigation conducted by the employment standards officer; complaints about the way in which the adjudicator conducted the hearing; and complaints about the ultimate outcome of the appeal hearing.

ANALYSIS

A central thrust of Kyllo's submission in support of his application for reconsideration is that he does not agree with certain findings of fact made by the adjudicator. However, the provision in the Act permitting a party to apply for a reconsideration of an appeal decision does not afford that party an unfettered opportunity to reargue their case. I agree with the principles set out in earlier reconsideration decisions issued by the Tribunal Chair (e.g., Kiss, Decision No. D122/96 and Khalsa Diwan Society, Decision No. D199/96), namely, that the reconsideration provision should be used sparingly and only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling

new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law.

Kyllo suggests that the employment standards officer who investigated the matter was biased. There is no evidence before me that the officer was biased in the sense of being in a conflict of interest, financially interested in the outcome, or having prejudged the issues in dispute between the parties.

Kyllo complains that Marika and Mariano Mejias were both allowed in the same room during each other's testimony. Kyllo says that the former employees should not have been allowed to testify in the presence of each other. I do not agree; both are respondent parties and as such had a right to be in attendance throughout the entire hearing. Kyllo also complains about the fact that the employees testified by way of a telephone conference call from Victoria, where they now reside (the other parties were in a hearing room in Fort St. John on the first day of the hearing and in Mackenzie on the second day of the hearing). Section 107 of the Act authorizes the adjudicator to conduct the hearing in such a manner as he or she considers necessary and I cannot, in all the circumstances, see that the hearing procedure followed in this case was improper. Indeed, I am of the view that the hearing procedure utilized in this case was entirely appropriate.

Kyllo also seeks a reconsideration on the ground that the adjudicator refused to make a recommendation under section 109(1)(a) of the Act to the effect that one or both of the respondent employees should be excluded by regulation from the provisions of the Act. This issue is entirely separate and apart from the issue that was before the adjudicator, namely, what wages, if any, were owed to the employees. An adjudicator must take the law as it exists at the time of the hearing. The adjudicator's refusal to make a recommendation under section 109(1)(a) was entirely proper.

There is only one matter raised by Kyllo in support of his application for reconsideration that has, in my view, any *prima facie* merit. Kyllo submits that the adjudicator refused to allow one of Kyllo's witness to testify by way of a telephone call from Abbotsford. Apparently, the adjudicator felt that the proposed witness' testimony was either superfluous or irrelevant. In a letter dated August 7th, 1996 the Tribunal Registrar sought specific information as the proposed witness' testimony. By way of reply dated August 9th, 1996, Kyllo stated that he

did not know precisely what the witness would say but that he *hoped* the witness would corroborate the employer's view that the claim put forward by the employees was inflated. Having carefully reviewed Kyllo's letter of August 9th, 1996, I must conclude that some of the proposed witness' testimony would have been given little, if any weight, because it would have been hearsay evidence. Further, given the finding of the adjudicator that the employees were entitled to be paid for time during which they were "on-call", the evidence of the proposed witness is largely irrelevant, even if it was accepted in its entirety. I might also add that Kyllo, in his letter of August 9th, 1996, frankly admits that the proposed witness' testimony would have merely replicated the evidence of a previous witness.

I might parenthetically add that, according to the employment standards officer's letter to the Tribunal dated August 17th, 1996 (he was in attendance at the hearing), the adjudicator did not refuse to allow Kyllo to put this witness' evidence forward. Rather, the adjudicator left the matter of whether to call this witness in the hands of Kyllo. Kyllo then made an independent decision not to put the witness forward as his evidence would have merely duplicated the testimony of a previous witnesses (a total of ten witnesses testified on behalf of the employer).

ORDER

The application, by way of reconsideration, to vary or cancel the decision of the adjudicator in this matter is refused.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal